No. 82-1460

IN THE

Supreme Court of the United States

October Term, 1982

BERNARD AVCOLLIE,

Petitioner

v.

STATE OF CONNECTICUT,

Respondent.

On Writ of Certiorari to The Supreme Court of the State of Connecticut

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the trial court's quashing of the grand juror subpoenas requires the granting of certiorari?

2. Whether the trial court's charge concerning intent requires the granting of certiorari?

3. Whether the trial court's charge concerning sanity requires the granting of certiorari?

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

This brief is submitted in opposition to a petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Connecticut entered in this proceeding on December 14, 1982.

STATEMENT OF THE CASE

I.

The defendant, a white male, was indicted for murder by a grand jury on November 21, 1975 and moved to dismiss his indictment before trial. During the hearing on that motion, his attorney subpoenaed the entire grand jury panel in an effort to question each of them about their grand jury service. The trial judge quashed the subpoenas because the defendant's attorney failed to make a showing that their testimony was required or relevant. *State v. Avcollie*, 188 Conn. 626, 629, 633-36, 453 A.2d 418, 420, 422-23 (1982).

II.

The defendant then went on trial charged with the murder of his wife, Wanda, whose body was found in the family swimming pool at about 2:00 a.m. on October 30, 1975. (T-62-74). Throughout the trial the defendant contested the fact that his wife was strangled as the prosecution claimed. His medical experts claimed that she had drowned. (T-1300, 1323, 1442, 1560). The defendant himself took the stand and testified that he did not strangle or kill his wife and that she was alive but obviously under the influence of liquor the last time he saw her at 12:30 a.m. that morning. (T-1105). The defendant also stated that he found some pentobarbital and valium pill bottles that morning open on the bathroom sink (T-801-02, 1183) and that his wife had been depressed. (T-1070). Witnesses testified the defendant claimed his wife had been taking pills and liquor just before her death. (T-1089, 1679-85). The autopsy tests, however, revealed that Mrs. Avcollie was not under the influence of alcohol or drugs when she died by strangulation (T-808, 565, 571-72) and that the level of pentobarbital (total ½ pill) in her liver and blood as well as her stomach contents showed she was killed before 12:30 a.m. at a time when she was alone with the defendant, according to the defendant, and engaged in a violent confrontation. (T-791, 793-95, 805-08, 880, 1100-03). No valium was found in her body. (T-

805-06). Other witnesses denied Mrs. Avcollie's depression and use of alcohol and drugs (T-1680, 1688) and testified that the defendant was "house-hunting" (the $115,000.00 range) with his girlfriend, her children, and his children only shortly before the murder. (T-895-903). The defendant himself stated he was in love with his girlfriend. (T-1063, 1146).

There was also testimony that the defendant's house was jointly held with his wife (T-1163), that his wife had determined to confront the defendant that evening, to get him out of the house, to seek a divorce herself and not to reduce her standard of living in those circumstances. (T-1679-84, 1690-93). While discussing her reasons for the breakup of their marriage, Mrs. Avcollie stated in reference to the defendant's well-known and multiple extra-marital affairs that the defendant was "sick." (T-1145-46).

III.

At the defendant's request the judge charged the trial jury only with respect to the crime of murder. His charge instructed the jury that it was its function to find the facts and draw such proper inferences from those facts as it might reasonably and logically draw. (T-3-4, Jury Charge, 7/18/77). The jury was told it was the inferences which it may draw from the evidence which would prevail, regardless of what the court said to it about the evidence. (T-2, Jury Charge, 7/18/77).

The jury was also told that circumstantial evidence involved the jury finding facts and then deciding whether those facts forced it logically to the conclusion that other facts exist or events occurred. (T-7, Jury Charge, 7/18/77).

The court also instructed the jury that the defendant was presumed to be innocent until proven guilty. (T-10, Jury Charge, 7/18/77). The court instructed the jury eight times that the State always had the burden of proving the guilt of the defendant beyond a reasonable doubt. The court stated that the State must prove the defendant guilty of each and every element of the offense

beyond a reasonable doubt and that the burden never shifts from the State to the defendant. (T-9-11, Jury Charge, 7/18/77).

In instructing the jury on the issue of intent the court told the jury that intent was an element of the offense that the State must prove beyond a reasonable doubt. The court described intent as a mental process which may be inferred from conduct. The court then observed that every person is presumed to intend the natural and necessary consequences of his acts, that it is often impossible and not necessary to prove criminal intent by direct evidence, and that ordinarily intent can be proved only by circumstantial evidence as the term had previously been described. (T-35-36, Jury Charge, 7/18/77).

The court next explained that finding intention is largely a matter of inference. Apart from the testimony of the actor, the court went on, the only method by which a jury can determine intent is by examining the person's conduct and the circumstances surrounding that conduct and from those infer intent. The jury was told to draw such inferences is its privilege and its duty if the inference is reasonable. The court then repeated it was the jury's duty to draw reasonable inferences from the conduct of the defendant and the circumstances surrounding it. The court concluded by stating that if the jury did not find beyond a reasonable doubt intent to cause death, its verdict should be not guilty. (T-36-38, Jury Charge, 7/18/77).

The court went on to discuss motive and charged that motive could also be inferred from conduct and surrounding circumstances. (T-38-39, Jury Charge, 7/18/77).

The jury was again instructed that no burden rests upon the defendant to disprove the charge, but the burden always remains upon the State to prove the charge of murder and all the essential elements as they have been explained to the jury beyond a reasonable doubt. (T-40, Jury Charge, 7/18/77).

The court also repeatedly instructed the jury that if the evidence was capable of more than one construction or interpretation which

is reasonable, one innocent and one guilty, it must interpret the facts as innocent rather than guilty. (T-9-41, Jury Charge, 7/18/77).

At the defendant's request the court then charged the jury, concerning the presumption of innocence, that the law presumes that laws are obeyed and that therefore it should find no illegal activity until it was convinced beyond all reasonable doubt of its existence. The court also instructed the jury the law presumes a death by accident absent proof by the State beyond all reasonable doubt otherwise. (T-42, Jury Charge, 7/18/77).

The court then repeated that the law never imposes upon a defendant the burden or the duty of calling any witnesses or producing any evidence. (T-43, Jury Charge, 7/18/77).

The defendant took no exceptions to the charge.

SUMMARY OF ARGUMENT

1. The trial court's quashing of the grand juror subpoenas does not require the granting of certiorari. The defendant failed to offer to prove through the grand jurors' testimony discrimination against a constitutionally cognizable group to which he belonged. In the absence of any preliminary factual showing of discrimination, the Connecticut Supreme Court correctly concluded that the trial court's quashing of the grand juror subpoenas was proper.

2. The trial court's charge concerning intent does not require the granting of certiorari. The Connecticut Supreme Court found no burden-shifting, conclusive, or mandatory presumption arising from the trial court's instructions. Because this portion of the charge constituted an entirely permissive presumption, it did not violate the principles set forth by this Court in *Sandstrom v. Montana*, 442 U. S. 510 (1979). Furthermore, this was not a case where intent was the crucial issue or where the jury was left only with this presumption to find intent and it was entirely rational to give such a charge in this case.

3. The trial court's charge concerning sanity does not require the granting of certiorari. Sanity was never an issue in the defendant's case. The defense of insanity, as defined in Connecticut General Statutes Section 53a-13, was never noticed or argued. The defendant himself acknowledged that the issue of insanity was never raised by the defense or by the evidence. The defendant took the stand and repeatedly denied killing his wife. The defendant neither requested a charge on the issue of sanity nor took an exception to the charge as given. Even if sanity were an issue in this case, there is a serious question whether any federal constitutional issue arises in light of this Court's holdings in *Leland v. Oregon*, 343 U. S. 790 (1952), and *Rivera v. Delaware*, 429 U. S. 877 (1976).

ARGUMENT

REASONS FOR DENYING THE WRIT

I.

The Trial Court's Quashing of the Grand Juror Subpoenas Does Not Require the Granting of Certiorari.

On May 12, 1976, the defendant filed a motion to dismiss the indictment on many grounds. Under one such ground he alleged, without any more specificity, that the grand jury was selected in an unconstitutional manner denying him due process and equal protection.

On May 20, 1976, the defendant called High Sheriff Healy to the stand in support of his motion and elicited testimony from Sheriff Healy that he had called the grand jury veniremen by telephone the day preceeding the grand jury hearing. (T-14-20, 5/20/76). Sheriff Healy stated there were no lawyers on the grand jury panel, and he was questioned at length about that fact. (T-5, 13, 40-41, 5/20/76). Sheriff Healy testified that in this case all the grand jury names came from lists of people who had served on previous grand juries. (T-14-20, 21-28, 36-40, 5/20/76). Sheriff Healy's testimony was then continued until June 3, at which time he was questioned about the telephone toll records for the day before the grand jury hearing. (T-2-7, 6/3/76). At neither session was Sheriff Healy asked any questions about the race, color or background of the grand jurors, some of whom Sheriff Healy stated he knew. (T-23-28, 5/20/76).

On June 3, 1976, each of the twenty grand jurors was subpoenaed by the defendant and appeared in the courtroom. (T-1, 29, 6/3/76).

The State moved to quash the subpoenas to the grand jurors, and the court inquired what testimony could be expected from the grand jurors. The defendant's counsel stated he wished to

question the grand jurors about the method of their selection and other preliminary matters. (T-9, 6/3/76). Defense counsel stated his purpose in questioning the grand jurors would be to discover each one's qualifications and background and to establish that each had served on prior grand juries. (T-11-12, 6/3/76). Defense counsel claimed that the grand jurors constituted a blue-ribbon grand jury consisting of professional grand jurors. (T-13, 6/3/76). He also claimed that there was discrimination against a particular class that had served on other grand juries, that is, members of the bar and apparently professional people. (T-16, 6/3/76). At this time it was stipulated that no member of the bar served on this grand jury. (T-18, 6/3/76).

Defense counsel then stated that he wished to question the grand jurors individually as to each one's recollection of the charge, understanding of the charge and feeling about the defendant being called as a witness. (T-22-26, 6/3/76). Each grand juror would also be asked about his definition of hearsay and other inadmissible evidence. (T-26, 6/3/76). When the court stated it would not allow such questions, defense counsel then indicated he wished to question the grand jurors about each one's background and to establish to what class each belonged. (T-29, 6/3/76). Defense counsel then stated it was quite obvious that there were no non-Caucasians in the grand jury group there in court. (T-29, 6/3/76). When the court agreed it observed all Caucasians in the group, defense counsel stated he would inquire into other classes not readily distinguishable which might create a constitutional infirmity. (T-29, 6/3/76). Acknowledging that he may well be accused of being on a fishing expedition, defense counsel stated he knew of no other way in which he could determine each grand juror's place of employment, occupation, wealth, religion and church attendance. (T-30, 6/3/76). The defendant was asked to show that any member of an identifiable group or class to which he belonged was systematically excluded from his grand jury, and the prosecutor observed he could not do so. (T-33, 6/3/76). Defense counsel frankly admitted he was not sure what

constituted a class and observed that a constitutionally cognizable class may be attorneys, people of affluence, or Hispanic peoples. (T-37-38, 6/3/76). No claim was made, however, that Mr. Avcollie was of Hispanic origin. Defense counsel also stated he would have preferred a grand jury of seven lawyers to one without any attorney. (T-38-39, 6/3/76). He stated he wished to question the grand jurors because some of them might be able to enlighten the court about the absence of an attorney on the panel. (T-39, 6/3/76).

Defense counsel concluded by stating he wished to question the individual grand jurors not only about discrimination but also about other preliminary issues which he had raised in his motion to dismiss the indictment. (T-40, 6/3/76). Defense counsel did not specify what these other issues were, and when the court pointed out that the remaining issues were already disposed of or awaiting briefs, defense counsel did not respond any further.

Thereafter, the court granted the motion to quash the subpoenas. (T-41, 6/3/76).

With respect to the motion to dismiss the indictment, Sheriff Healy testified at length again on June 15, 1976. He was asked about the Sheriff's telephone toll records for the day before the grand jury hearing. The toll records were introduced through a telephone company employee, and thereafter the evidence was closed. (T-117, 6/15/76). At no time was Sheriff Healy asked a single question about the background, race, religion, economic condition or age of these or previous grand jurors.

The defendant's counsel had stated on June 3, 1976, that his investigator had contacted each grand juror on this grand jury. (T-30, 6/3/76). Yet, no evidence was presented by any investigator, nor were the previous grand jury lists offered for the purpose of observing Hispanic surnames or for determining the sex of the grand jurors.

After the hearing the defendant filed a memorandum concerning the claim of grand jury selection in an unconstitutional manner.

That portion of his June 24, 1976 memorandum is set forth in appendix "A" to this brief. In his memorandum the defendant stated:

> These [Connecticut] cases [previously cited] recognize that a discrimination claim in the selection of grand jurors must be based on the systematic exclusion of an identifiable class. This defendant's argument concerning the selection of the grand jurors which considered his indictment is really based on a different premise.

Respondent's App. A at 2a. It may be seen that the trial judge was correct when he observed in his memorandum of decision dated July 26, 1976, that the defendant "does not claim that the selection process failed to obtain or to guarantee an impartial Grand Jury drawn from a cross-section of the community and that there was a systematic and intentional exclusion of certain electors of the county, rather, he claims that the High Sheriff did not select the names from the computerized list as has been done for the last several years. Petitioner's App. at 9a.

The defendant, now through different counsel, complains that he was deprived of an opportunity to establish grounds to dismiss his indictment when the subpoenas were quashed. His argument apparently is grounded on his later claim that he could not prove that some still unspecified class may have been excluded from his grand jury without calling these grand jurors as witnesses to ask them if they had ever served with "a black Grand Juror, a Hispanic Grand Juror, etc." *See* Brief of Defendant-Appellant to the Connecticut Supreme Court at 23.

The transcript reveals, however, that Sheriff Healy, who had selected and presented grand jurors for three and a half years before this grand jury, was not asked that question. Nor, was the trial judge ever informed by defendant's then counsel that this was the purpose of the defendant's calling the grand jurors as witnesses. (T-5/20/76, 6/3/76, 6/15/76).

In order for the defendant to prevail on a claim of grand jury discrimination, he must show that there was an intentional and systematic exclusion of a constitutionally cognizable group. *See Rose v. Mitchell*, 443 U.S. 545 (1979). Given the failure of the defendant to allege any such facts at the hearing, the trial court was correct in quashing the subpoenas directed to the twenty grand jurors. In *Rojas v. State*, 288 So.2d 234 (Fla. 1973), *cert. denied*, 419 U.S. 851 (1974), the Florida Supreme Court held that in order to avoid a "fishing expedition" of broad range, an affidavit or some preliminary factual showing of discrimination is required before a full scale inquiry into the grand jury panel would be allowed. 288 So.2d at 237 (citing *United States v. Hoffa*, 349 F.2d 20 (6th Cir. 1965), *cert. granted* on another issue, 382 U.S. 1024, *aff'd*, 385 U.S. 293 (1966); *Windom v. United States*, 260 F.2d 384 (10th Cir. 1958); 47 Am.Jur.2d *Jury* § 182). This reasoning was followed in *Dykman v. State*, 294 So.2d 633, 637 (Fla. 1974), *cert. denied*, 419 U.S. 1105 (1975). In *Calvo v. State*, 313 So.2d 39 (Fla. Dist. Ct. App. 1975), *cert. denied*, 330 So.2d 15, *cert. denied*, 429 U.S. 918 (1976), a Florida District Court of Appeals relied upon *Rojas* and *Dykman* to sustain the action of the trial judge who had denied the defendant's request for subpoena of those persons on the grand jury lists.

In this case, the defendant did not attempt to prove any discrimination in the selection of the grand jury beyond what was stipulated to or what he proved through Sheriff Healy's testimony. His claim that he might possibly come up with such discrimination if allowed to trawl through a grand jury panel on a fishing expedition justified the court's excusing the grand jurors from subpoena.

Also, the defendant did not allege or attempt to prove that the grand jurors' testimony would reveal the exclusion of any constitutionally identifiable or cognizable group. In *United States v. Guzman*, 337 F. Supp. 140, 143-44 (S.D.N.Y.), *aff'd*, 468 F.2d 1245 (2d Cir. 1972), *cert. denied*, 410 U.S. 937 (1973), the court defined a constitutionally cognizable group as a definite one

having "a community of interest which interest cannot be protected by the rest of the populace."

Such a group has also been defined by this Court as a recognizable distinct class which has been singled out for different treatment under the laws as written or applied, *Castaneda v. Partida*, 430 U.S. 482, 495 (1977), and as one requiring the aid of the courts in securing equal treatment under the laws, *Hernandez, v. Texas*, 347 U. S. 475, 479 (1954). In *People v. Estrada*, 93 Cal. App. 3d 76, 155 Cal. Rptr. 731 (Ct. App. 1979), the California court refused to accord such a designation to young people, blue-collar workers, householders with less than $15,000 income or less educated (under 12th grade) persons. In this case, the defendant's only offer was an attempt to prove that the grand jury was comprised of persons alike as to age, professional experience, education and economic condition. He, in effect, made no attempt to prove the intentional and systematic exclusion of any constitutionally cognizable group.

Furthermore, with respect to state grand jury challenges, the State submits that the federal Constitution only supports equal protection challenges. *See Villafane v. Manson*, 504 F. Supp. 78, 82 n. 6 (D. Conn. 1980). However, an equal protection argument by the defendant is without merit because he utterly failed to offer to prove through the grand jurors' testimony discrimination against a constitutionally cognizable group to which he himself belonged. *See Castaneda v. Partida*, 430 U. S. 482, 492 (1977).

The quashing of the grand juror subpoenas, a matter really of state procedural law, does not require the granting of certiorari.

II.

The Trial Court's Charge Concerning Intent Does Not Require the Granting of Certiorari.

The jury was told in this case that if they did not find intent to murder beyond a reasonable doubt, they should acquit the defendant. They were also instructed that intent could generally be

found or inferred only by finding what the defendant's conduct was and what the circumstances were surrounding that conduct. The inference, they were told, had to be reasonable. In this context, the court commented that a person is presumed to intend the natural consequences of his acts. The jury was told that the term "circumstantial evidence," the ordinary proof of intent, had been defined.

At this point the court reminded the jury that it had explained the term "circumstantial evidence." In its previous reference the court had explained that circumstantial evidence involved the jury finding facts and then deciding whether those facts forced it logically to the conclusion that other facts exist or events occurred. The court went on to explain that intent is necessarily very largely a matter of inference. The jury was told that they could generally determine what a person's purpose of intention was at a given time, aside from that person's testimony, only by determining what a person's conduct was and the circumstances surrounding that conduct and then from those infer intention.

The charge in this case omitted the words "the law" presumes and premised the comments concerning presumption with reference to inference and followed it by the same language. At no time in the charge did the trial judge use the term "conclusively" in reference to the presumption of intent from action. The charge did not shift the burden of proof to the defendant as the jury was repeatedly told that the State always must prove every element of the offense and that the burden never shifts to the defendant. (T-11, 40, 43, Jury Charge, 7/18/77). The trial judge was careful to instruct the jury that if they did not find such an intent beyond a reasonable doubt they should acquit the defendant.

The defendant places principal reliance upon *Sandstrom v. Montana*, 442 U.S. 510 (1979), for the proposition that the charge in this case violated due process by shifting the burden of proof from the State to the defendant. It is pointed out that the charge in this case, however, merely contains "general comments by the Court upon the validity of presuming intent from action"

not condemned by *Sandstrom v. Montana*, 442 U.S. at 519-20 n.9.

The charge in *Sandstrom* offended due process as it stated "[*t*]*he law* presumes that a person intends the ordinary consequences of his voluntary acts," 442 U.S. at 517 (emphasis in original), whereas the charge in this case stated the jury may infer mental state from conduct and commented that every person is presumed to intend the natural and necessary consequences of his acts, explaining that intent ordinarily can be proved by such circumstantial evidence.

In the *Sandstrom* case, the jury was only told the law presumes intent from action and not told that they might infer that conclusion or that they had a choice. 442 U.S. at 515. In this case, the jury was told that the jury could decide whether facts forced it to conclude other facts or events occurred, and that the jury could only generally determine what a person's intention was by determining the person's conduct and what circumstances surrounded that conduct. In conclusion, the jury was told if they were not satisfied beyond a reasonable doubt that the defendant had an intent to cause death they should find him not guilty.

The portion of the charge as given constituted an entirely permissive inference or presumption described and approved in *Ulster County Court v. Allen*, 442 U.S. 140 (1979). Here the jury was left to credit or reject the inference and the charge did not shift the burden of proof. Here, as in *Ulster County Court*, the jury was clearly and repeatedly reminded of the presumption of innocence, the State's never shifting burden of proving guilt beyond a reasonable doubt, and that the defendant had no burden to produce any evidence or testimony.

The instruction so given was certainly not "the functional equivalent of a directed verdict on the issue" of intent condemned in *Sandstrom* as explained in *Connecticut v. Johnson*, —U.S.—, 103 S.Ct. 969 (1983). Indeed, the Connecticut Supreme Court, as shown in the *Johnson* case, has been sensitive to applying

Sandstrom in the light of the entire charge, and in this case the Connecticut court found no burden-shifting, conclusive, or mandatory presumption arising from the instructions. *State v. Avcollie*, 188 Conn. 626, 638-40, 453 A.2d 418, 424 (1982). The respondent submits that *Johnson* underscores the correctness of the Connecticut court's conclusion.

Other courts have also upheld such comment where it was explained in terms of inference and when not mandated upon the jury as a matter of law. *See Gagne v. Meachum*, 602 F.2d 471, 473 (1st Cir.), *cert. denied*, 444 U.S. 992 (1979); *United States v. Garrett*, 574 F.2d 778, 782 (3d Cir.), *cert. denied*, 436 U.S. 919 (1978); *McInerney v. Berman*, 473 F. Supp 187, 190 (D. Mass. 1979); *United States v. Chiantese*, 582 F.2d 974, 976 (5th Cir. 1978), *cert. denied*, 441 U.S. 922 (1979).

The defendant did not except to the intent charge and did not request any other charge regarding intent. In this case the defendant had contested the fact that his wife was murdered. He himself testified that he did not strangle his wife and that she was still alive when she left him that early morning an hour and a half before her body was found. The defendant's explanation of her death was that Wanda Avcollie drowned while under the influence of alcohol and had taken pills from the open pill bottles on the night of her death. His testimony was disputed by the autopsy findings.

The Connecticut Supreme Court pointed out in this case the central factual issue was whether Wanda Avcollie was strangled to death. *State v. Avcollie*, 178 Conn. 450, 460, 423 A.2d 118, 124 (1979). The trial was outlined as a dispute between pathologists as to the cause of death. 178 Conn. at 460-66, 423 A.2d at 124-27. The court stated once that fact was established there was evidence of intent. 178 Conn. at 467-69, 423 A.2d at 127-28. That evidence was the defendant no longer loved his wife and wanted to leave her for someone else, Wanda Avcollie's intention to confront the defendant and seek a divorce, and the defendant's

false statements about his wife's condition and about the open pill bottles, no doubt to imply that Mrs. Avcollie had taken the pills. 178 Conn. at 470-71, 423 A.2d at 128-29.

The defendant's defense here was simply that his wife was never harmed by anyone and more particularly not harmed by him. This was hardly a case where intent was the crucial issue or where the jury was left to rely only on such a presumption to find intent. Once the jury found Wanda Avcollie was strangled and her body was placed in a swimming pool the defendant's acts were not equally susceptible of innocent motive and guilty purpose. In this case, the instruction, not given in conclusive, burden-shifting or mandatory terms but in a permissive context, was entirely rational and does not require the granting of certiorari. *See Ulster County Court v. Allen*, 442 U. S. at 164.

III.

The Trial Court's Charge Concerning Sanity Does Not Require the Granting of Certiorari.

In this case the trial judge instructed the jury it could rely on the presumption of sanity to find the defendant had the mental capacity to commit murder unless some "credible evidence tending to prove the contrary has been introduced." (T-35, Jury Charge, 7/18/77). The court went on to state: "In this case, as I recall the evidence, no such evidence of unsound mind has been introduced. As I said earlier your recollection of the evidence controls." (T-35, Jury Charge, 7/18/77). At the conclusion of this charge, the defendant took no exceptions whatsoever. (T-2, 7/18-7/19/77).

At the trial, the defense of insanity was never noticed or argued. The defendant himself offered no evidence on the issue of insanity. No requests to charge on the issue of sanity were filed by the defendant. In fact, in his January 28, 1980 Motion for Acquittal, the defendant acknowledged that "[t]he issue of insanity was never raised by the defense or by the evidence." Petitioner's App. at 2la.

Later on appeal, the defendant claimed that hearsay statements, introduced during the State's rebuttal case and purported to be a lay opinion concerning the defendant's mental condition, were sufficient evidence to put the sanity of the defendant in issue. *See* Brief of Defendant-Appellant to the Connecticut Supreme Court at 28-29, 33-36. The hearsay statements (T-1684-86), related by the witness Elizabeth Ann Brown, concerned Wanda Avcollie's opinion that the defendant was "sick" in reference to his extra-marital affairs with Mary Jane Rado and others (T-1145-46), for which Wanda Avcollie could forgive the defendant but not continue to live with him. (T-1682-85).

There was no evidence, however, introduced at the defendant's trial that at the time of the killing and "as a result of mental disease or defect [the defendant] lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." *See* Conn. Gen. Stat. §53a-13. Thus, absolutely no evidence of insanity as a defense was introduced at trial.

It is obvious that the defendant raised no issue of his capacity to commit murder at his trial. He gave the trial court no notice of the claim he now makes. The defendant took the stand and repeatedly denied killing his wife. (T-1038-1246). His defense urged that, in fact, Wanda Avcollie was not killed but died accidentally. The defendant made a conscious decision to try his case in this way, and he thereby waived any claim to an insanity defense as a part of his trial strategy. The defendant's failure to except to the judge's charge was another consequence of this decision and based upon this omission the Connecticut Supreme Court refused to review the defendant's sanity charge claims. *State v. Avcollie*, 188 Conn. at 638, 453 A.2d at 424.

Now the defendant asks this Court to find that the United States Constitution requires it to review his conviction. Under *Leland v. Oregon*, 343 U. S. 790 (1952), and *Rivera v. Delaware*, 429 U. S. 877 (1976), there is a serious question whether any federal con-

stitutional issue arises even if sanity were an issue in the defendant's case. *See Patterson v. New York*, 432 U. S. 198, 203-06 (1977).

The simple fact, however, is that sanity was never an issue in the defendant's case. In this case, the statements concerning the defendant's mental condition, if they be such, were not the opinion of an expert, nor even that of the witness herself. They were merely hearsay statements made by the defendant's deceased wife, Wanda Avcollie. At most, the statements reflected Wanda Avcollie's belief that the defendant had emotional or psychological problems related to their marital difficulties and his extramarital affairs. No psychiatrist, psychologist, social worker or any other person testified concerning the effects upon the defendant of any mental disease or condition at the time of the murder. In light of the statutory criteria for insanity, Mrs. Brown's testimony was simply insufficient to raise a reasonable doubt as to the legal sanity of the defendant at the time of the crime. Under Connecticut law, there must be *substantial* evidence of insanity so as to place the issue before the jury, *i.e.* evidence sufficient, if credited, to raise a reasonable doubt as to the sanity of the defendant at the time of the crime. *See State v. Conte*, 157 Conn. 209, 212-13, 251 A.2d 81, 83 (1968), *cert. denied*, 396 U. S. 964 (1969).

The defendant asks this Court now to hold that there was no evidence of sanity and therefore the defendant must be acquitted in light of this so-called insanity evidence. This argument is without merit. The trial judge and jury obviously did not view the evidence as that of insanity. The judge and jury were also present when the defendant testified, and he gave no hint to them that he was mentally ill at the time of the murder. In this case, *In re Winship*, 397 U. S. 358 (1970), does not require the granting of certiorari.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

THE STATE OF CONNECTICUT

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APPENDIX

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APPENDIX A

No. 12468

STATE OF CONNECTICUT SUPERIOR COURT

VS. JUDICIAL DISTRICT OF WATERBURY

BERNARD L. AVCOLLIE JUNE 24, 1976

DEFENDANT'S MEMORANDUM II RE MOTION TO DISMISS INDICTMENT

* * * * * *

I. ARGUMENT

A. THE INDICTMENT IS INVALID BECAUSE IT WAS RETURNED BY A GRAND JURY SELECTED IN AN UNCONSTITUTIONAL MANNER.

In proving the allegations made by the defendant in connection with this Argument, Henry Healy, High Sheriff of New Haven County, testified extensively on three separate days of evidential hearings. The defendant will not impose upon the court's time by summarizing all of the Sheriff's testimony, but the defendant does claim that the following facts were proved:

1. During the tenure of Henry Healy as High Sheriff of New Haven County, he has, at the direction of the Superior Court summoned approximately 12 grand juries.

2. With the exception of the grand jury which indicted Bernard Avcollie, the members of the other grand juries were selected from computerized lists sent to the Sheriff at his request by the judicial computer center at Middletown.

3. The grand jury which indicted Bernard Avcollie was not selected from a computerized list, but was hand picked by the Sheriff from a limited list of persons who previously had served on grand juries.

4. All of the jurors who served on the grand jury which indicted Bernard Avcollie were volunteers.

5. Of all the grand juries summoned by the Sheriff during his tenure of office, this is the only grand jury which was ordered convened on twenty-four hours' notice.

6. There was no member of the Connecticut bar on the grand jury which indicted Bernard Avcollie, although a member of the bar was on most of the other grand juries summoned by the Sheriff.

7. The Sheriff asked the State's Attorney for additional time within which to summon a grand jury, but he was told to have the grand jury convened by 9 o'clock the following morning.

The court is familiar with the existing case law in Connecticut concerning the selection of grand juries. *State v. Cobbs*, 164 Conn. 402 (1973), *State v. Stallings*, 154 Conn. 272 (1966), and *State v. Villafane*, 164 Conn. 637 (1973), all deal with the manner of selection of grand jurors. These cases recognize that a discrimination claim in the selection of grand jurors must be based on the systematic exclusion of an identifiable class. This defendant's argument concerning the selection of the grand jurors which considered his indictment is really based on a different premise.

This defendant contends that whether or not it was required by the Constitution or by statute, it had been the custom of the High Sheriff of New Haven County to select grand jurors from a continually changing computer list sent out by the judicial computer center at Middletown. In spite of this regular practice and custom, however, that procedure was not followed in selecting the grand jury which indicted Bernard Avcollie. No good reason has been shown in all of the arguments which were had on this issue to demonstrate why it was necessary or desirable to depart from the usual practice and procedure in selecting the grand jury which indicted Bernard Avcollie. Quite obviously, the procedure both in selecting the grand jury and in the conduct of the grand jury proceedings was unique to this case. Although the usual Connecticut

practice is to have the defendant in the grand jury room during the taking of testimony, this defendant not only was excluded from the grand jury room, but was not even given notice that the grand jury was being convened. Compare *State v. Mennillo*, 159 Conn. 264 (1970). In contravention of the usual Connecticut practice no lawyer was on the grand jury panel which indicted this defendant. Compare *Cobbs v. Robinson*, 528 F.2d 1331 (2d Cir. 1975). The members of this grand jury were all volunteers who had previously served on grand juries, although the usual procedure for selecting grand jurors in New Haven County had been to use the computer list published by the judicial computer center at Middletown. The conclusion is unavoidable that Bernard Avcollie, for one reason or another, has been singled out for special prosecutorial treatment in this case.

Any one of the departures from the usual Connecticut practice as argued by the defendant, ought to be enough to justify a dismissal of the indictment. Cumulatively, the court must find that this defendant's procedural and substantive rights have been so seriously jeopardized by the conduct of the State that he has been denied both the equal protection of the laws and due process of law. It is highly significant that in the most recent federal decision concerning the Connecticut grand jury system, Judge Robert Anderson of the Second Circuit Court of Appeals had occasion to discuss the procedures of the Connecticut grand jury. Judge Anderson found that the Connecticut practice resulted in grand juries which were independent and impartial because of certain unique features of the system:

> In addition, the independence and impartial character of the grand jury is supported and buttressed by the following unique features of the Connecticut grand jury procedure:
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> (1) Neither the State's Attorney nor any counsel for the prosecution is allowed to appear before the grand jury. The prosecutor remains outside the grand jury room and sends the State's witnesses in one at a time for examination by the grand jury.

(2) There is a practicing attorney among the membership of the grand jury who usually acts as the foreman. He leads off in the examination of the witnesses, exercises some control to minimize the use of evidence which would be inadmissible at the trial itself, see *State v. Kemp*, 126 Conn. 60, 71, 9 A. 2d 63 (1939), and seeks to protect both the interests of the person charged and the State.

(3) A person who is charged by the State with having committed a crime punishable by death or life imprisonment and whose case is being presented to a grand jury is permitted at his own election to be present in the grand jury room while the witnesses are being interrogated. He himself may question any or all of the witnesses though the grand jurors may not question or examine him. He may not call or present witnesses to appear before the grand jury.

The right to be present in the grand jury room during the interrogation of witnesses was first accorded a suspect in *Lung's Case*, 1 Conn. 428 (1815), and has been continued by the "liberality of (the Connecticut practice" *(State v. Fasset*, 16 Conn. 457, 468 (1844)) up to the present time.

528 F.2d at 1338. The only "unique feature" of the Connecticut grand jury system which was preserved in the proceedings against Bernard Avcollie was that the State's Attorney remained outside the grand jury room. This defendant has been undeniably prejudiced by the departure from the usual Connecticut practice in the other respects mentioned by Judge Anderson.

The court ought also to attach considerable significance to the reluctance of the State to be candid concerning the abnormally short time within which this grand jury was ordered convened, and the State's lack of candor concerning whether or not there was a motion to exclude the defendant from the grand jury proceedings. The court will remember that transcripts of hearings and arguments on November 24, 1975, and January 29, 1976, contained conflicting statements by Judge Yale Matzkin and by Assistant

State's Attorney Joseph Hill as to whether there was a motion to exclude the defendant from the grand jury room. It has been and remains the defendant's contention that he has a right to be present in the grand jury room unless for good cause shown the court enters an order of exclusion.

The defendant has also alleged that the grand jury was selected in an unconstitutional manner because the members of the grand jury were all volunteers of similar background, experience, age and professional experience. The defendant was denied an opportunity to question the grand jurors on these points in spite of his argument that *State v. Davis*, 158 Conn. 341 (1969) not only gives him the right, but imposes the obligation upon the defendant to prove his allegations by direct evidence.

Certain aspects of Sheriff's Healy's testimony concerning the summoning of grand jurors were contradictory. The Sheriff's recollection of the number of grand jurors whom he called, the hours during which the calls were made, the places from which the calls were made, all changed from time to time during his testimony - apparently in an effort to conform to what he believed to be the necessary requirements to validate the grand jury proceedings. The defendant respectfully submits that the direct evidence introduced on these points to impeach the credibility of the High Sheriff, to wit: the telephone records, contradicts the High Sheriff's oral testimony. Again the conclusion is inescapable that Bernard Avcollie was the victim of a concerted effort to pick a volunteer blue-ribbon grand jury which would be sure to indict him on whatever evidence the State saw fit to introduce in his absence. Apparently in an effort to prevent the defendant from having adequate disclosure of the nature of the case against him so as to prepare his defense, the State's Attorney unilaterally saw to it that the defendant was not permitted in the grand jury room. Surely the evidence adduced so far in this case indicates that prior to the time the grand jury was convened, the State had already made the decision to prosecute this defendant and had committed

itself to prosecution. Compare *State v. Stallings*, 154 Conn. 272 (1966) and *Kirby v. Illinois*, 406 U. S. 682 (1972).

The State's purposeful selection of a volunteer blue-ribbon grand jury, and its singularly discriminatory manner of prosecution against this defendant require a dismissal of the pending indictment.

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